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RESEARCH ARTICLE

Compensation schemes and the tort system in the context of occupational and public health

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Abstract

Compensation schemes are certainly not a new phenomenon in England and Wales, and they are increasingly being used, and called for, to compensate victims in the field of occupational and public health. Despite their long existence, compensation schemes have always been thought to develop on ad hoc basis, without any real discernible logic behind them. This paper suggests that, contrary to this idea, compensation schemes emerging in the field of occupational and public health are generally following an identifiable, if covert, pattern that is deeply rooted in their relationship with the tort system. This relationship, the paper contends, is crucial not only to explain the creation and operation of compensation schemes but also to shed some light on the place and limits of the tort system in this legal system. More than that, this paper demonstrates that the relationship between these two sources of compensation could be the key to offer the beginning of a categorisation of compensation schemes that could help identify which schemes are in need of reform.

Keywords: compensation schemes; tort law; statutory compensation schemes; public health; non-statutory compensation schemes; occupational health

1. Introduction

In many legal systems, a wide range of compensation sources is now available to victims of personal injury: tort law; private insurance; social security; and – perhaps playing a more hidden and the least well-understood role – compensation schemes. While the first three sources have attracted significant scholarly attention, the development of compensation schemes in England and Wales has, comparatively, gone mostly[1] unnoticed.[2] This oversight is unfortunate, particularly given that these schemes have existed for a long time[3] and continue to grow in number.

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[1]Interest in no-fault compensation schemes grew in the 1970s, particularly following the Pearson Commission's report (R Lewis 'Waiting for Pearson: the policy choices to be made in accident compensation' (1978) 12 The Law Teacher 1), but declined when it became clear that the UK Government had no intention of implementing the reforms (Lord Sumption 'Abolishing personal injuries law – a project' (Personal Injuries Bar Association Annual Lecture, London, 16 November 2017) p 1, available at https://supremecourt.uk/uploads/speech_171116_d85b82486e.pdf (last visited 18 June 2025)).

[2]With the exceptions of Cane and Goudkamp (P Cane and J Goudkamp Atiyah's Accidents, *Compensation and the Law* (Cambridge: Cambridge University press, 9th edn, 2018)), Oliphant (K Oliphant 'Compensation funds in the United Kingdom' in T Vansweevelt and B Weyts (eds) *Compensation Funds in Comparative Perspective* (Cambridge: Intersentia, 2020)), Macleod and Hodges (S Macleod and C Hodges (eds) *Redress Schemes for Personal Injuries* (Oxford: Hart Publishing, 2017)) and Harlow

Despite this growth, accurately determining the number of operational schemes in England and Wales proves challenging, as many, particularly those that are industry-led, are developed covertly.[4] This lack of visibility obscures their development and raises fundamental questions: Why are these schemes needed? How do they interact with the tort system? Is there a coherent logic underlying their operation? While such issues have been explored in other legal systems[5] or through comparative perspectives,[6] the English and Welsh legal system remains underexamined in this regard.[7]

Yet, it is imperative to improve our understanding of how compensation schemes operate in England and Wales, given the increasing calls for the development of new schemes. Recent examples include the as yet unaddressed[8] proposals for a bespoke compensation scheme for adverse effects from Covid-19 vaccines,[9] and the Independent Medicines and Medical Devices Safety Review's[10] (the 'Cumberlege Report') recommendations to create three specific compensation schemes[11] for victims of hormone pregnancy tests, sodium valproate, and pelvic mesh, as well as a general Redress Agency[12] to oversee compensation for harm caused by medicines and medical devices. While the then Government showed a lack of appetite for these recommendations,[13] the situation may change following the publication of the 'Hughes Report'.[14] Finally, the new Infected Blood Compensation Scheme (2024),[15] established following the findings of the Infected Blood Inquiry[16] and designed to replace earlier, inadequate schemes,

(C Harlow *Compensation and Government Torts* (London: Sweet and Maxwell, Modern Legal Studies, 1982) pp 117–156), the literature on compensation schemes is usually piecemeal in its approach. It often provides valuable insights into the inner workings of individual schemes (see references throughout this work). Textbooks on tort law usually include only brief discussions of compensation schemes, focusing on major ones such as the Criminal Injuries Compensation Scheme, for instance.

[3]Oliphant, ibid, p 164.

[4]Lesser-known compensation schemes include the Ian Paterson (Liability to Private Patients) Compensation Fund 2017 (closed in 2018) and another 2021 scheme for his private patients, as well as the Ofcom Automatic Compensation Scheme, which has received relatively little publicity. As noted by Macleod and Hodges, there is often 'a lack of knowledge of their [ie compensation schemes'] existence': S Macleod and C Hodges 'An introduction to the schemes' in Macleod and Hodges, above n 2, p 7.

[5]J Knetsch *Le droit de la responsabilité et les fonds d'indemnisation* (Paris: LGDJ, coll. Bibliothèque de droit privé, t. 548, 2013); K Watts *A Comparative Law Analysis of No-Fault Comprehensive Compensation Funds: International Best Practice and Contemporary Applications* (Cambridge: Intersentia, 2023).

[6]Macleod and Hodges (eds), above n 2; Vansweevelt and Weyts (eds), above n 2; E Lemaire *Risques sanitaires sériels et responsabilité civile: étude comparée des droits français et anglais* (Paris: L'Harmattan, 2021) pp 141–172; J Dute et al *No-Fault Compensation in the Health Care Sector* (Vienna: Springer, 2004).

[7]See the references above in n 2.

[8]Covid-19 vaccine injury victims can receive a £120,000 lump sum under the Vaccine Damage Payment Scheme, but no *specific* compensation scheme for this category of victims has been introduced yet: Vaccine Damage Payments (Specified Disease) Order 2020, SI 2020/1411.

[9]D Fairgrieve et al 'COVID-19 vaccines: in favour of a bespoke compensation scheme for adverse effects. A briefing paper' (British Institute of International and Comparative Law, 11 November 2020) pp 6–7, available at https://www.biicl.org/publications/covid-19-vaccines-in-favour-of-a-bespoke-compensation-scheme-for-adverse-effects-a-briefing-paper (last visited 18 June 2025). A more recent proposal has been made during the Covid-19 inquiry (module 4 – vaccines and therapeutics): A Morris KC *Closing Statement on behalf of UK CV Family, Scottish Vaccine Injury Group and Vaccine Injured and Bereaved UK*, UK Covid-19 Inquiry, transcript of Module 4 Public Hearing, 31 January 2025, pp 23–24, available at https://covid19.public-inquiry.uk/documents/transcript-of-module-4-public-hearing-on-31-january-2025/ (last visited 18 June 2025).

[10]Baroness Cumberlege (chairman) *First Do No Harm. The Report of the Independent Medicines and Medical Devices Safety Review* (London, 8 July 2020) available at https://www.immdsreview.org.uk/downloads/IMMDSReview_Web.pdf (last visited 31/03/2025).

[11]Ibid, p 12, at paras 1.38–1.39.

[12]Ibid, p 11, paras 1.34–1.35.

[13]Department of Health & Social Care *Government Response to the Report of the Independent Medicines and Medical Devices Safety Review*, 26 July 2021, pp 22–23, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005847/IMMDS_Review_-_Government_response_-_220721.pdf (last visited 18 June 2025).

[14]Patient Safety Commissioner *The Hughes Report: Options for redress for those harmed by valproate and pelvic mesh*, 7 February 2024, available at https://www.patientsafetycommissioner.org.uk/our-reports/the-hughes-report/ (last visited 31/03//2025).

[15]The Victims and Prisoners Act 2024, Part 3; The Infected Blood Compensation Scheme Regulations 2024, SI 2024/872.

[16]Sir Brian Langstaff *Infected Blood Inquiry: The Report*, HC 569-I, 20 May 2024, available at https://www.infectedbloodinquiry.org.uk/reports/inquiry-report (last visited 18 June 2025).

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highlights the continued need for functional compensation schemes. Understanding the implicit rules underpinning current schemes, as well as their connection to the tort system, could facilitate more efficient reforms and the development of effective future schemes.

To gain this understanding, the paper will focus on a particular area where these schemes are significantly used. While compensation schemes are deployed across various sectors[17] and situations,[18] this paper focuses on their role in occupational and public health in England and Wales. Three main reasons explain this focus: first, this area provides a highly fertile ground for the development of compensation schemes; secondly, narrowing the scope to a single context facilitates the identification of commonalities among them; and thirdly, practical constraints necessitate limiting the analysis, as the sheer number of schemes requires a prioritisation of what can realistically be addressed in a single paper. As a result, the compensation schemes examined in this paper include those for thalidomide, occupational dust-related diseases, variant Creutzfeldt-Jakob (vCJD), vaccine damage, and infected blood. However, the new Infected Blood Compensation Scheme (2024) stands out as a unique case among occupational and public health compensation schemes. Unlike others, it presents a highly unusual combination of characteristics[19] which can be explained by its specific background,[20] and for this reason, this scheme will be excluded from the analysis.

Compensation schemes in the occupational and public health sectors are extremely diverse – varying in shape, size, structure, funding, and administration. To borrow Oliphant's words, 'it is hard to discern any particular pattern or logic behind them',[21] reinforcing the perception that these schemes have developed haphazardly, unstructured and on a case-by-case basis. Contrary to this initial impression, however, this paper demonstrates that compensation schemes in the field of occupational and public health have not developed in as unstructured a manner as their apparent diversity might suggest. On the contrary, this paper contends that compensation schemes in England and Wales exhibit greater uniformity than is initially apparent, with their underlying logic deeply rooted in their relationship to the tort system.[22] As such, the paper contributes to the existing literature by identifying a crucial relationship between these compensation schemes and the tort system that explains the creation and use of the former as well as the place and limits of the latter. Examining these schemes through this lens reveals a clear pattern: the main motivation for their creation strongly influences the rules governing their operation. Recognising this pattern could help formalise some of the covert rules currently guiding compensation schemes in England and Wales and provide a foundation for designing future schemes at both national and international levels.[23]

[17]Examples include financial services (Financial Services Compensation Scheme, Pension Protection Fund), telecommunications (Ofcom Automatic Compensation Scheme), transport (Motor Insurance Bureau, especially for uninsured and untraced drivers), the armed forces (Armed Forces Compensation Scheme, War Pensions Scheme), and criminal injuries (Criminal Injuries Compensation Scheme).

[18]Recent examples include the 'Windrush scandal' (Windrush Compensation Scheme) and the 'Post Office scandal' (Horizon Shortfall Scheme).

[19]In contrast to other schemes, this scheme presents a very unusual combination as it is a statutory compensation scheme driven, in part, by concerns over liability exposure (on this last point see Sir Robert Francis QC *Compensation and Redress for the Victims of Infected Blood – Recommendations for a Framework*, 7 June 2022, pp 24, 117, available at https://www.gov.uk/government/publications/compensation-and-redress-for-the-victims-of-infected-blood-recommendations-for-a-framework (last visited 18 June 2025)).

[20]This distinct approach reflects the long and highly publicised history of the infected blood scandal, the repeated failures of previous non-statutory compensation schemes in this area, and the Government's deliberate efforts to restore public confidence. Indeed, this scheme is the third attempt to create an adequate framework for victims, following the findings of the Infected Blood Inquiry which exposed serious failures by the Government and public authorities. By enshrining the scheme in legislation, the Government aimed to demonstrate a decisive break from past shortcomings and 'its absolute commitment to delivering long-overdue justice to the victims' (Hansard HC Deb, vol 748, col 801, 23 April 2024).

[21]Oliphant, above n 2, p 167.

[22]In this paper, the term 'tort system' specifically refers to the application of tort law within a judicial context.

[23]International compensation schemes are emerging in public health, as illustrated by the global Covid-19 vaccine injury compensation scheme: the World Health Organization 'No-fault compensation programme for COVID-19 vaccines is a world first', News release, 22 February 2021, available at https://www.who.int/news/item/22-02-2021-no-fault-compensation-programme-for-covid-19-vaccines-is-a-world-first (last visited 18 June 2025).

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The paper is divided into four main sections. Section 2 lays the groundwork for understanding compensation schemes by defining the term and resolving a legislative debate on whether 'payment schemes' fall under the category of 'compensation schemes'. Sections 3 and 4 propose a categorisation of compensation schemes in the field of occupational and public health. Section 3 explores the motivations behind the creation of compensation schemes and the contexts in which they are established, highlighting the important influence of the tort system in their emergence. Section 4 builds on this analysis by exploring how these motivations shape the design of compensation schemes. It argues that these motivations influence beneficiaries' subsequent rights in tort law, including their ability to bring civil claims and the potential compensation available through the tort system. Finally, section 5 concludes by reflecting on the broader implications of the uncovered pattern, shedding light not only on the nature of compensation schemes but also on the place and limits of the tort system in England and Wales.

2. The meaning of 'compensation scheme'

The introduction noted five areas in occupational and public health where compensation schemes have been used in England and Wales: (1) thalidomide; (2) occupational dust-related diseases; (3) variant Creutzfeldt-Jakob disease; (4) vaccine damage; and (5) infected blood. However, the inclusion of all corresponding schemes under the heading 'compensation scheme' is not without controversy. In common law literature, the term 'compensation scheme' (or compensation fund)[24] is often used but seldom defined. It generally refers to any scheme created specifically to provide compensation to certain categories of victims 'whose damage is the consequence of certain circumstances, described by law'[25] or in a private agreement.[26]

Yet, the terminology can sometimes be confusing, as some schemes are called 'compensation schemes' and others 'payment schemes'. Those who emphasise the distinction[27] argue that it lies in the intended *purpose* of the payment made to beneficiaries: compensation schemes are said to provide 'compensation' to beneficiaries, while payment schemes aim to offer 'financial support'[28] to the specified group. Accordingly, proponents of this distinction contend that a payment scheme does not provide 'compensation' because otherwise a payment under the scheme would bar any subsequent civil proceedings for compensation.[29] With respect, this argument is unconvincing. It suggests that, unlike payment schemes, compensation schemes *always* prevent beneficiaries from claiming damages after receiving a payment. Yet, there are clear examples of compensation schemes that do not impose such a restriction.[30]

Similarly, it has been suggested that the difference between compensation schemes and payment schemes lies in the fact that payment schemes do not compensate beneficiaries for their loss, or at least not for their pain and suffering, while compensation scheme do.[31] This could be an appropriate distinction except that when beneficiaries of payment schemes later receive a civil award, the value of that award – including the part relating to pain and suffering (general damages) – is reduced by the value

[24]Oliphant, above n 2, p 162 fn 1; Watts, above n 5, p 21.

[25]L Vanhooff et al 'So many funds, so many alternatives: compensation funds as a solution for liability issues in Belgium, the Netherlands and the United Kingdom' (2016) 8 European Journal of Commercial Contract Law 41; Knetsch, above n 5, pp 224–225.

[26]This is an important addition, as not all compensation schemes in the UK are created through statutory provisions.

[27]Government officials have emphasised that schemes like the Vaccine Damage Payment Scheme (Hansard HC Deb, vol 962, col 34, 5 February 1979) and the Diffuse Mesothelioma Payment Scheme (Hansard HL Deb, vol 745 col 689, 20 May 2013) are 'payment schemes', not compensation schemes.

[28]Eg in relation to the Vaccine Damage Payment Scheme specifically: Hansard HL Deb, vol 399, col 304, 8 March 1979.

[29]Hansard HC Deb, vol 962, col 34, 5 February 1979.

[30]See, for example, the variant Creutzeldt-Jakob disease (vCJD) Trust, widely recognised as a compensation scheme (Hansard HC Deb, vol 355, col 385, 26 October 2000). For further details, see the text to nn 131–140 below. The new Infected Blood Compensation Scheme (2024) serves as another example of a compensation scheme that allows its beneficiaries to pursue legal action.

[31]Hansard HL Deb, vol 745, col 722, 20 May 2013.

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of the lump sum payment distributed by the payment scheme.[32] The fact that this clawback is applied to general damages rather than just special damages clearly suggests that payment schemes do, at least indirectly, compensate beneficiaries for pain and suffering. Therefore, the purpose of the payment cannot serve as the distinguishing factor between compensation schemes and payment schemes.

In reality, the distinction between compensation schemes and payment schemes remains largely unclear and appears more ideological than practical.[33] It may simply reflect the reluctance of those who create 'payment schemes' to use the term 'compensation', which could remain associated with legal liability – particularly when the Government is the scheme's architect. In these cases, the Government may establish redress schemes for one of two goals:[34] (1) to provide 'support and relief'[35] as an expression of social solidarity; or (2) to avoid potential legal liability.[36] In the former case, the Government often refers to the schemes as a 'payment scheme', whereas the latter is more likely to be labelled a 'compensation scheme'.[37]

Nevertheless, since payment schemes *do* provide compensation to their intended beneficiaries in practice,[38] they will be addressed as 'compensation schemes' for the purpose of this paper.

3. The importance of the tort system in the creation of compensation schemes

All compensation schemes related to occupational and public health are connected to the tort system, although the nature of this connection depends significantly on how effectively the tort system manages liability claims. This section will show that a pattern emerges in which the connection to the tort system varies between non-statutory compensation schemes – those not created by statute – and statutory compensation schemes, which are established by statute. Specifically, it will demonstrate that non-statutory schemes are generally designed to divert liability claims away from the tort system, while statutory schemes are often introduced when the tort system is, in some way, unavailable.

(a) Non-statutory compensation schemes

Non-statutory compensation schemes in the field of occupational and public health – including those for coal dust, thalidomide, infected blood and vCJD – are often created on an ad hoc basis and are closely connected to the existence or potential existence of liability claims. For this reason, these schemes are generally the result of an agreement proposed by (at least) one defendant in such claims and can be further divided into two subcategories: (1) most are introduced because the defendant is *exposed* to legal liability; (2) fewer are established after the defendant is *held* legally liable. This proposed distinction not only highlights the tort system's influence in the creation of non-statutory compensation schemes but also underscores the different ways it shapes their development.

(i) The defendant is exposed to legal liability

Non-statutory compensation schemes in this subcategory are extremely varied, with significant structural differences regarding the type of defendant (eg government department, nationalised or private

[32]See the text to nn 113–130 below.

[33]The method of assessing compensation – specifically, whether it is quantified based on itemised losses (compensation schemes) or as a lump sum (payment schemes) – may be central to the distinction, but this issue should be further explored elsewhere.

[34]See the text to nn 39–102 below.

[35]Hansard HC Deb, vol 962, cols 34–38, 5 February 1979 (vaccine-damage); Hansard HL Deb, vol 399, cols 304, 309–310, 8 March 1979 (vaccine-damage); Hansard HL Deb, vol 745, col 692, 20 May 2013 (mesothelioma).

[36]See the examples provided throughout this work, and other schemes, such as those created in response to the Windrush scandal and the Horizon/Post Office scandal.

[37]Although there are exceptions, such as the Criminal Injuries Compensation Scheme.

[38]Hansard HC Deb, above n 29, col 70.

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company), the type of administrator (eg charitable trust, non-departmental public body, or private company), and even the source of funding (eg public or private funds, or a combination of the two). Notwithstanding, these schemes share two common features: (1) they are designed by a defendant who is exposed to potential (and potentially huge) legal liability; (2) payments under the scheme are always made *ex gratia*, ie on a voluntary basis, when there is no legal obligation or liability to do so.[39] Accordingly, defendants make payments through compensation schemes while explicitly denying any legal liability.

In most situations, the defendant proposing a non-statutory scheme is already facing liability claims, as seen in the case of thalidomide, infected blood, and coal dust. For thalidomide[40] and infected blood (HIV-infected haemophiliacs only),[41] the emergence of compensation schemes was connected to the settlements of specific group litigations, with the schemes' outline included in the settlements themselves. In both situations, the defendants continued to deny any legal liability. In the context of coal dust, the Coal Workers' Pneumoconiosis Compensation Scheme[42] (1974) was introduced not in response to a specific claim, but rather to address an unmanageable volume of claims against the scheme's defendant. In *Pickles v The National Coal Board*,[43] a former employee of the National Coal Board (NCB) successfully applied ex parte for leave to bring an action in negligence and breach of statutory duty against the NCB despite being technically time-barred. This case, eventually settled, paved the way for a huge number of claims against the NCB to arise.[44] Following the decision, the NCB introduced this scheme in a bid to draw all legal claims initiated by its employees, coal miners suffering from pneumonoconiosis, outside the judicial framework.[45] The scheme was born out of an agreement between the NCB and the coal mining unions to preserve 'the interests of the industry and those employed in it'.[46] Once again, no liability was admitted.

In other situations, the defendant may not yet be facing liability claims but is likely to do so in the future, as seen in the context of vCJD. The vCJD Trust was established before any legal proceedings were fully initiated in court, as families only instructed solicitors and filed lawsuits against the Government to prevent the statute of limitation from running.[47] The circumstances surrounding the establishment of this scheme shed light on its underlying motivation. Creutzfeldt-Jakob disease is mostly a sporadic disease affecting elderly people. In 1996, a new disease pattern, called variant CJD (vCJD), was discovered to affect people much younger than was usually the case with CJD.[48] Following the suggestion in the media – and later by the Secretary of State for Health[49] – that there was a link between this new disease and the consumption of meat contaminated with Bovine Spongiform Encephalitis (BSE), families of victims began a campaign for a public inquiry. Following their efforts, the 'BSE Inquiry' chaired by Lord Phillips was established in 1998.[50] The final report, published in October 2000, concluded that vCJD was

[39]A Stevenson (ed), *Oxford Dictionary of English* (Oxford: Oxford University Press, 3rd edn, 2015) under '*ex gratia*'.

[40]For a detailed history of the creation of the Thalidomide Trust see D Body 'The legacy of thalidomide' (2018) Journal of Personal Injury Law 159 at 160–166; S Macleod 'The Thalidomide Trust' in Macleod and Hodges (eds), above n 2, pp 373–377.

[41]In the context of infected blood, the outline of the Macfarlane (Special Payments) (No 2) Trust was included in the settlement proposed by the 'First Central Defendants' to resolve the (*Re) HIV Haemophiliac Litigation*. For a detailed history of the infected blood scandal see AM Farrell *The Politics of Blood: Ethics, Innovation, and the Regulation of Risk* (Cambridge: Cambridge University Press, 2012). A copy of the *(Re) HIV Haemophiliacs Litigation* settlement is available at https://www.taintedblood.info/tb/files/Settlement%20Agreement.pdf (last visited 18 June 2025), para 1(1) of the main settlement.

[42]Hansard HC Deb, vol 888, cols 1110–1111, 14 March 1975.

[43][1968] 1 WLR 997.

[44]*Royal Commission on Civil Liability and Compensation for Personal Injury*, Report Cm 7054-I (1978) p 172, para 789.

[45]Hansard HC Deb, vol 906, col 1067, 1 March 1976.

[46]*Royal Commission on Civil Liability and Compensation for Personal Injury*, above n 44, p 172.

[47]A Boggio 'The compensation of the victims of the Creutzfeldt-Jacob Disease in the United Kingdom' (2005) 7 Medical Law International 149 at 159 and 163; JM Williams 'Variant Creutzfeldt Jakob disease: setting up the VCJD trust – operations and lessons for the future' (2004) Journal of Personal Injury Law 39 at 41.

[48]Williams, ibid, at 40.

[49]Hansard HC Deb, vol 274, col 375, 20 March 1996.

[50]Lord Phillips of Worth Matravers et al *The Inquiry into BSE and Variant CJD in the United Kingdom*, vol 1 (2000), available at https://webarchive.nationalarchives.gov.uk/ukgwa/20060802142310/http://www.bseinquiry.gov.uk/ (last visited 18 June 2025).

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likely caused by BSE and identified areas of shortcomings in the management of the crisis.[51] Around the same time, families of the vCJD victims publicised their intention to bring legal actions against the Government.[52] Following the publication of the BSE Inquiry report, the Government announced that it would provide compensation to vCJD victims and their families, though it would not admit liability.[53] A briefing note addressed to the Secretary of State[54] clearly outlines that the proposed scheme was designed 'to reduce the incentive to bring litigation',[55] and that 'families are obtaining sums in the alternative to litigation'.[56] This demonstrates that, despite the denial of liability, the creation of the vCJD Trust was directly tied to the risk of legal liability, as the compensation was intended to prevent further litigation.

Whether the defendant is already facing liability claims (thalidomide, infected blood, and coal miners) or is likely to face such claims in the future (BSE/vCJD), their primary motivation appears to be to end or prevent legal proceedings. These non-statutory compensation schemes are designed as proactive responses to potential liability claims. This explains why they are often introduced before any judicial decision is made, allowing defendants to offer financial packages to victims while denying legal liability. Consequently, these schemes function as administrative vehicles for distributing payments outside the judicial framework. However, while defendants (or potential future defendants) use compensation schemes to avoid litigation, the underlying reasons for their desire to settle tort claims are more difficult to pinpoint.

The avoidance of costly litigation can be, in and of itself, a strong incentive for the settlement of liability claims, as the Coal Workers' Pneumoconiosis Scheme (1974) illustrates. In the context of thalidomide, infected blood and BSE/vCJD – three of the most infamous public health scandals in modern British history – additional considerations may have influenced the defendants' decision to settle the claims using a compensation scheme. The victims were numerous, the cases were high-profile, and public emotions ran high (sympathy for the victims, outrage *vis-à-vis* the defendants). The defendants felt the brunt of legal, media and political pressure all at once:[57] (1) legal pressure from victims through group litigations being, or about to be, initiated in courts; (2) media pressure from extensive coverage of the 'scandal', which generated public outcry; and (3) political pressure from hard campaigning led by victims' associations giving their cause political momentum and support. In these circumstances, proposing a financial package and a compensation scheme became a good option for defendants to alleviate some of this pressure. Such measures demonstrate their acceptance of *moral responsibility* (but not legal liability) for the scandal and serve to appease both the victims and the public.[58]

(ii) The defendant is held legally liable

Non-statutory compensation schemes established after a defendant has been found legally liable do not merely respond to the defendant's exposure to legal liability, and payments made through these schemes are not distributed on an *ex gratia* basis. Although rare, such schemes are introduced specifically because

[51]Ibid, vol 13, para 1169; G Little 'BSE and the regulation of risk' (2001) 64 Modrn Law Review 730 at 731.

[52]A Alderson 'Families of CJD victims will sue for millions' (London, *The Telegraph*, 22 October 2000), available at https://www.telegraph.co.uk/news/uknews/1371272/Families-of-CJD-victims-will-sue-for-millions.html (last visited 18 June 2025).

[53]Hansard HC Deb, vol 355, cols 384–385, 26 October 2000.

[54]L-A Mulcahy *vCJD Trust: Briefing Note for Secretary of State*, 13 July 2006, available at https://www.infectedbloodinquiry.org.uk/sites/default/files/p2%20701-1000%20docs_2/p2%20701-1000%20docs/DHSC0006797_022%20-%20vCJD%20Trust%20Briefing%20note%20for%20the%20Secretary%20of%20State%20-%2013%20Jul%202006.pdf (last visited 18 June 2025).

[55]Ibid, para 17.

[56]Ibid, para 19.

[57]In the thalidomide case, the defendant accepted a 1973 settlement following an aggressive campaign by *The Sunday Times* in 1972, supported by MPs like Jack Ashley (Hansard HC Deb, vol 847, cols 432–436, 29 November 1972). See also Body, above n 40, at 160–166. In the infected blood scandal, the Government initially refused to provide any financial provisions for haemophiliacs, but later established the MacFarlane Trust after pressure from victims, the UK Haemophilia Society, the media, and MPs. When compensation was deemed inadequate, haemophiliacs initiated legal proceedings against more than 200 defendants.

[58]Knetsch, above n 5, pp 109–110.

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the defendant has been found legally liable: they serve as settlement schemes designed to unclog the courts from evaluating individual awards where liability has been recognised towards a large class of claimants. For this reason, while the operation of the scheme is drafted in an agreement between the defendants' and claimants' legal representatives, it also needs court approval.

The Coal Health Compensation Schemes, described as 'the largest personal injury schemes in British legal history',[59] are a striking example of this type of settlement scheme. These two compensation schemes were established for the benefit of former miners suffering from chronic obstructive pulmonary disease (COPD) and vibration white finger (VWF) due to their work for the British Coal Corporation (BCC). In 1998, the BCC was found negligent regarding both COPD[60] and VWF.[61] Upon the corporation's privatisation, all liabilities passed to the Department of Trade and Industry (DTI). By then, with over 740,000 claims,[62] it was clear that the 'uniquely large volume of claims'[63] required the evaluation of individual awards through a non-judicial administrative process. Negotiations between the DTI and the solicitors' groups representing the claimants resulted in two agreements approved by the court, defining how COPD claims (the COPD Scheme)[64] and VWF claims (the VWF Scheme)[65] would be managed.[66] Non-statutory compensation schemes established after a finding of liability can be seen as an extension of the judicial process, as the court generally continues to oversee their operation.[67] These administrative structures provide a convenient means to evaluate individual awards in a time-efficient manner and address any future potential claims that may incur similar liability.

In summary, non-statutory compensation schemes – whether created by a defendant exposed to liability or one that has been held liable – result from extensive negotiations between the parties, their legal representatives, and organisations interested in the matter (including unions or victims' associations). The rules governing the operation of these schemes are generally the result of an agreement between the stakeholders.[68] More importantly, the main motivation behind these schemes is to move present and future legal liability claims away from the tort system. Consequently, defendants introduce non-statutory compensation schemes because claimants have the option of a tort action and appear willing to exercise that option to assert their (alleged) right to compensation. Thus, the availability and use of the tort system are critical to the emergence of non-statutory compensation schemes, a situation that contrasts significantly with the use of statutory compensation schemes.

(b) Statutory compensation schemes

Unlike non-statutory compensation schemes, statutory compensation schemes are not designed to circumvent the tort system and, as such, are not created by defendants in tort actions. Instead, in the context of occupational and public health, statutory compensation schemes have often been introduced

[59]S Macleod 'Miners' compensation schemes' in Macleod and Hodges (eds), above n 2, p 535.

[60]*Griffiths and Others v British Coal Corporation and Another* [1998] EWHC 2008 (QB).

[61]*Armstrong and Others v British Coal Corporation and Another* [1998] EWCA Civ 1359.

[62]Cane and Goudkamp, above n 2, p 270.

[63]*Armstrong and Others v British Coal Corporation and Another*, above n 61, at [77] (Turner J).

[64]*Claims Handling Agreement (England and Wales) between the Department of Trade & Industry and the British Coal Respiratory Disease Litigation Claimants Solicitors Group*, 24 September 1999 (amended on 20/12/2005) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/65671/7232-claims-handling-agreement-for-the-chronic-obstruct.pdf (last visited 31/03/2025).

[65]*Claims Handling Arrangement (England and Wales) between the Department of Trade & Industry and the Vibration White Finger Litigation Solicitors Group*, 22 January 1999, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/48286/7233-claims-handling-agreement-for-the-vibration-white-.pdf (last visited 18 June 2025).

[66]Macleod, above n 59, pp 534–556.

[67]The National Audit Office Report *Coal Health Compensation Schemes*, Report by the Comptroller and Auditor General, Report of Session 2006-07, HC 608, 18 July 2007 (HMSO, 2007) p 8 (para 1.4), available at https://www.nao.org.uk/wp-content/uploads/2007/07/0607608.pdf (last visited 18 June 2025).

[68]See the text to nn 40–46, and 59–66 above.

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because, to varying extents, the tort system was not a viable option for claimants. Some were created when the liable party disappeared or could not be found, others when no liable party existed, and some for victims with no real prospect of success in court. In this context, it can be argued that the tort system is effectively unavailable to these victims.

As a result, statutory schemes are often a legislative response to the inability of certain categories of victims to obtain damages through the tort system, reflecting a form of social solidarity. However, while this unavailability of the tort system is often an important factor in the creation of such schemes, it is not always sufficient on its own. Political motivations, societal recognition of affected groups, and the severity or public visibility of health conditions also play a role in determining why these schemes are created for some conditions but not others.

(i) The liable party disappeared or cannot be found

Two statutory compensation schemes provide compensation to victims of occupational diseases who are unable to sue the liable party – either because the liable party disappeared or cannot be traced: the first is the Pneumoconiosis etc (Workers' Compensation) Scheme (1979); the second the Diffuse Mesothelioma Payment Scheme (2014).

The Pneumoconiosis etc (Workers' Compensation) Act 1979 established a compensation scheme for sufferers of certain prescribed, lung-related occupational diseases. Although the scheme was initially designed to support Welsh slate quarry workers afflicted with pneumoconiosis, it has since become primarily focused on mesothelioma sufferers. Its creation was not solely a matter of public health; by addressing the needs of this important constituency for Plaid Cymru, the minority Labour Government aimed to secure political support ahead of the 1979 general election.[69] To qualify for the lump sum payment under the scheme, sufferers must prove, among other requirements, that 'every relevant employer … has ceased to carry on business'[70] and that they have 'not brought any action, or compromised any claim, for damages in respect of the disablement'.[71] These two rules clearly indicate that this compensation scheme is restricted to those who cannot obtain compensation through other means, including the tort system, because the liable party – the employer – disappeared. The then Minister of State in the Department of Employment confirmed that

> the effect of these restrictions is to limit compensation to those who have no employer to sue and to avoid a situation in which the State would, in effect, be shouldering the responsibilities of existing employers as an alternative to their facing action in courts.[72]

The same observation applies to the Diffuse Mesothelioma Payment Scheme (2014), a statutory compensation scheme established for mesothelioma sufferers who contracted the disease due to negligent occupational exposure to asbestos. Its focus on occupational mesothelioma is justified by the unique nature of the disease – fatal, exclusively caused by asbestos exposure, and often tied to negligent business practices – as well as the significant challenges victims face in tracing liable employers or insurers, given the long latency period between exposure and symptom onset.[73] Given these challenges, the scheme establishes specific eligibility criteria to ensure that compensation reaches those who cannot access it through the traditional tort system. To be eligible for a payment under this scheme,

[69]A Ogus 'Legislation, the courts and the demand for compensation' in RCO Matthews (ed) *Economy and Democracy* (London: Macmillan, 1985) pp 157–158.

[70]Pneumoconiosis etc (Workers' Compensation) Act 1979, s 2(1)(b).

[71]Ibid, s 2(1)(c).

[72]Hansard HC Deb, vol 965, col 1081, 2 April 1979.

[73]Department for Work & Pensions *Accessing Compensation – Supporting People Who Need to Trace Employers' Liability Insurance*, Government response to consultation, July 2012, p 8, para 4.2, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/185022/elci-compensation-consultation-response.pdf (last visited 18 June 2025).

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sufferers must cumulatively prove, among other requirements, that: (1) they did not bring 'an action for damages in respect of the disease against the relevant employer'[74] or against the employer's insurer; (2) they were unable to bring such action because the employer or insurer could not be found, no longer existed or for any other reasons;[75] and (3) they did not receive damages or a specified payment[76] and are not eligible to receive a specified payment.[77] Lord Freud, the Parliamentary Under-Secretary of State in the Department of Work and Pensions, confirmed that it was always 'the policy intention that this scheme must be one of last resort and that all other avenues should be exhausted first'.[78]

In both situations, the tort system was unavailable to victims of certain occupational diseases because the liable party could not be found or had ceased to exist, prompting the establishment of a statutory compensation scheme to provide some form of compensation as a last resort.[79] Considering that eligibility for these two compensation schemes depends on proving the unavailability of the tort system, they are not intended to replace it. On the contrary, the eligibility rules aim to exclude applicants who have another option for redress at an early stage. It reveals that, in the eyes of the legislators, the tort system remains the primary avenue for redress, while the compensation schemes are designed to bridge the remaining compensation gaps – serving as an ultimate safety net.

(ii) There is no liable party

Individuals suffering from mesothelioma because of exposure to asbestos are eligible for a lump sum payment from another compensation scheme, regardless of their employment status. Established in Part 4 of the Child Maintenance and Other Payments Act 2008, this scheme was designed to provide swift compensation to all mesothelioma sufferers and to address the 'gaps left by the [Pneumoconiosis etc (Workers' Compensation)] 1979 Act'.[80] Three categories of mesothelioma sufferers were particularly disadvantaged due to their ineligibility under the Pneumoconiosis etc (Workers' Compensation) Scheme (1979)[81] and their inability to pursue court damages: (1) those exposed to asbestos environmentally, (2) those with secondary exposure; and (3) those who were self-employed.[82] For sufferers exposed through environmental sources or self-employment, no liable party existed to sue, leaving them unable to seek recourse under the tort system. For mesothelioma cases involving secondary exposure (eg through a spouse's employer), a liable party may have existed, but proving negligence and causation was more challenging due to the victim's indirect exposure to asbestos.[83] Although the 2008 scheme is open to all mesothelioma sufferers,[84] these three groups were its primary intended beneficiaries.[85]

The Mesothelioma Scheme (2008) was engineered to address two tort-related needs. For sufferers able to pursue a tort claim, the scheme aims to provide early relief, offering faster access to compensation than the traditional tort system. This accelerated support is really important, as mesothelioma sufferers have an average life expectancy of about a year post-diagnosis.[86] For those unable to pursue a tort claim, the scheme serves as a last resort source of compensation, ensuring support for individuals who are otherwise unlikely to secure it through the tort system.

[74]Mesothelioma Act 2014, s 2(1)(c).

[75]Ibid, s 2(1)(d).

[76]A list of specified payments is available in The Diffuse Mesothelioma Payment Scheme Regulations 2014, SI 2014/916, Sch 2.

[77]Mesothelioma Act 2014, s 2(1)(e).

[78]Hansard HL Deb, vol 747, col 1050, 22 July 2013.

[79]*Ballantine v Newalls Insulation Company Ltd* [2001] ICR 25, at [10] (Buxton LJ).

[80]N Wikeley 'Child Maintenance and Other Payments Act 2008' (2008) 15(4) Journal of Social Security Law D115 at D118.

[81]But see the exceptional case *Ballantine*, above n 79, involving a mesothelioma claimant receiving payment under the 1979 scheme due to environmental exposure, though the circumstances of this case were highly unusual.

[82]N Wikeley 'The new mesothelioma compensation scheme' (2009) 16(1) Journal of Social Security Law 30 at 35.

[83]In the case of secondary exposure, *Maguire v Harland & Wolff plc* [2005] EWCA Civ 1 (no compensation – risk of injury through secondary exposure deemed unforeseeable before 1965). But *contra*: *Carey v Vauxhall Motors Ltd* [2019] EWHC 238 (QB).

[84]See the conditions of entitlement: Child Maintenance and Other Payments Act 2008, s 47.

[85]Hansard HL Deb, vol 697, col 585, 18 December 2007.

[86]J Obacz et al 'Biological basis for novel mesothelioma therapies' (2021) 125 British Journal of Cancer 1039.

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(iii) There is no real prospect of success in court

The Vaccine Damage Payment (VDP) Scheme (1979) provides a fixed lump sum payment to certain people[87] who have been severely damaged by vaccinations against specified diseases.[88] The goal is different to the other three statutory schemes, and the scheme is intended to offer financial relief to the small minority of people who experience adverse effects from vaccines administered as part of public health programs.[89] The establishment of the VDP Scheme was driven by several factors. These included the advocacy and publicity efforts of the Association of Parents of Vaccine Damaged Children, led by Rosemary Fox, with support from MPs;[90] ongoing legal actions against the then Department of Health and Social Security (DHSS) and local authorities, which prompted the DHSS to offer *ex gratia* payments to settle claims;[91] and finally, the Pearson Commission's recognition of the significant challenges vaccination victims face in seeking redress through the tort system, which led to their recommendation that the Government or relevant local authority should bear strict liability in tort for harm caused by recommended vaccinations.[92] Although barriers in the tort system were one contributing factor, the scheme's introduction was primarily driven by advocacy and political pressure. Nonetheless, subsequent developments in tort law have made the scheme essential for affected individuals.

In the context of vaccine-related injury, successfully claiming damages is extremely challenging, if not impossible. Claimants may attempt a negligence action against public authorities that recommended the use of the vaccine in the public interest, but establishing a duty of care, breach of duty and causation is highly difficult. These challenges were an important reason for the Pearson Commission's recommendation to develop strict liability in these circumstances.[93] Alternatively, claimants might sue the manufacturer, but this requires proving either the manufacturer's negligence or that the vaccine was defective, which is no small feat. A claim could also be made in negligence against the doctor who administered the vaccine, but unless the doctor adopted a practice unsupported by a responsible body of professional opinion,[94] the claim is likely to fail. Yet, across all these situations, the primary obstacle remains proving causation.[95] As Pywell noted, the judicial route 'has never led to a successful claim in England or Wales, principally because of the outcome in *Loveday v Renton*'.[96] This case, related to the pertussis vaccine, collapsed on the preliminary issue of general causation when Stuart-Smith LJ declared that the causal link between the administration of pertussis vaccine and the occurrence of brain damage in young children had not been proved on the balance of probabilities.[97] In addition to these obstacles, remedies for damages are sometimes further restricted in emergency situations. During crises like Covid-19, the Human Medicine Regulations 2012 can activate regulation 345, which protects manufacturers, healthcare professionals, and others from civil liability,[98] except for claims under the Consumer

[87]See the conditions of entitlement in the Vaccine Damage Payments Act 1979, s 2.

[88]Covid-19 was recently added: Vaccine Damage Payments (Specified Disease) Order 2020, SI 2020/1411.

[89]Hansard HC Deb, above n 29, col 32.

[90]R Tindley 'A critical analysis of the vaccine damage payments scheme' (2008) 19(2) European Business Law Review 321 at 329–330.

[91]Ibid, at 330–331.

[92]*Royal Commission on Civil Liability and Compensation for Personal Injury*, above n 44, pp 297–298.

[93]Ibid, p 298.

[94]*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, 587.

[95]R Goldberg 'Vaccine damage and causation – social and legal implications' (1996) 3(3) Journal of Social Security Law 100 at 102–109. Also see the references in E Rajneri et al 'Remedies for damage caused by vaccines: a comparative study of four European legal systems' (2018) 1 European Review of Private Law 57 at fn 156.

[96]S Pywell 'The vaccine damage payment scheme: a proposal for radical reform' (2002) 9(2) Journal of Social Security Law 73 at 74; S Pywell 'A critical review of the recent and impending changes to the law of statutory compensation for vaccine damage' (2000) Journal of Personal Injury Law 246 at 248.

[97]*Loveday v Renton and Wellcome Foundation* [1990] 1 Med LR 117.

[98]E Lemaire 'La responsabilité des producteurs de vaccins contre la Covid-19: regards de droit anglais', [Actes de colloque] Colloque 'Covid-19 et droit de l'indemnisation' (2022) 1 *Les Cahiers Louis Josserand*, available at https://www.lexbase.fr/article-juridique/86756074-actesdecolloquescolloquecovid19etdroitdelindemnisationlaresponsabilitedesproducteurs (last visited 18 June 2025).

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Protection Act 1987 (defective products).[99] For all these reasons, claimants injured by vaccines have no real prospect of success in English and Welsh courts. As Tindley noted in 2008, 'to date, no UK litigant has received tort damages for vaccine-injury',[100] a statement that remains accurate.

While causation is still an important obstacle for applicants to the VDP Scheme, this scheme remains the 'only proven route to redress for people damaged by vaccine'.[101] Although this scheme was not solely introduced to address the limitations of the tort system, it has become the only, albeit challenging,[102] means of obtaining redress in practice.

4. The effects of compensation schemes on entitlements in tort law

The previous section highlighted the important influence of the tort system in the creation of compensation schemes. Whether statutory or non-statutory, compensation schemes are introduced in reaction to the existing tort system. The primary difference between the two types lies in their underlying purpose: non-statutory schemes are generally created by defendants to divert compensation claims away from the tort system, while statutory schemes are often legislative responses designed to address the inability of certain victim groups to obtain compensation through the traditional tort route (ie the 'unavailability' of the tort option). This distinction is important because, as this section will demonstrate, the motivations behind the creation of compensation schemes largely influence some of their operational rules. This section argues that these two primary motivations help explain how receiving payment from a scheme impacts subsequent access to the tort system and how any potential overlapping compensation sources are managed.

(a) Subsequent actions in tort for the same medical conditions

The distinction between non-statutory and statutory compensation schemes, as previously outlined, further leads to clear differences in how these schemes operate. For instance, while receiving a payment under a non-statutory scheme often excludes a civil compensation claim for the same injury, receiving payment under a statutory scheme does not.

(i) Subsequent actions in tort prohibited

The settlement or private agreement governing non-statutory compensation schemes often includes a prohibitive rule that precludes beneficiaries who receive a payment from the scheme from pursuing a tort action for the same medical conditions. Considering that these schemes are designed to redirect compensation claims away from the tort system, such a rule is unsurprising and serves as the quickest way to ensure the schemes achieve their intended purpose.

For instance, in the case of infected blood, the Macfarlane (Special Payments) (No 2) Trust was established to benefit HIV-infected haemophiliacs in an agreement aimed at settling the *HIV Haemophiliacs Litigation*. The settlement clearly specified that, with a few exceptions, beneficiaries could only receive payments from the Trust by 'signing an undertaking not to bring proceedings against any Defendant or … Government body'.[103] A similar rule applied to the Coal Workers' Pneumoconiosis

[99]A legal action is currently ongoing regarding harms, including deaths, allegedly caused by the administration of the AstraZeneca vaccine: F Walsh 'AstraZeneca faces legal challenge over Covid vaccine' (BBC News, 9 November 2023), available at https://www.bbc.co.uk/news/health-67370454 (last visited 18 June 2025).

[100]Tindley, above n 90, at 347.

[101]Pywell (2002), above n 96, at 74.

[102]R Goldberg 'Vaccine damage schemes in the US and UK reappraised: making them fit for purpose in the light of Covid-19' (2022) 42(4) Legal Studies 576 at 590–591.

[103]*(Re) HIV Haemophiliacs Litigation* settlement, above n 41, cll 5 and 8 of the main settlement agreement. However, this situation may change, as a group action was initiated in 2017 against the Secretary of State for Health. For further details, see the defining issues of the Infected Blood Products Group Litigation (No 100), available at https://www.gov.uk/government/publications/group-litigation-orders/list-of-group-litigation-orders#contaminated-blood-products-group-litigation (last visited 18 June 2025).

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Compensation Scheme (1974), as confirmed by the then Minister of State from the Department of Employment,[104] and can also be found within the agreements for the COPD[105] and VWF[106] Schemes.

(ii) Subsequent actions in tort allowed

When considering statutory compensation schemes, the possibility of a beneficiary pursuing a subsequent tort claim can seem paradoxical because these schemes are designed to address the inability to obtain compensation through the traditional judicial route. As noted, claims under the Pneumoconiosis Scheme (1979) or the Diffuse Mesothelioma Payment Scheme (2014) are only possible when the employer, or their insurer, no longer exists or cannot be found. But what happens if the employer or insurer is located *after* the claimant has already received compensation from the scheme? While such cases are rare, they can still occur. As for the Mesothelioma Scheme (2008) and the VDP Scheme (1979), beneficiaries are not required to prove the unavailability of the tort route to qualify, and they can technically receive payments regardless of whether another route for redress exists. Accordingly, the question of whether a tort action is permissible after receiving payment under these schemes remains relevant across all four statutory compensation schemes.

The limitation identified in non-statutory compensation schemes does not apply to statutory schemes: qualifying claimants who receive compensation from any of the four statutory schemes can still pursue damages, even for the same medical conditions. For the three dust-related schemes (1979, 2008 and 2014 schemes),[107] this is implied by provisions aimed at preventing the claimants' double recovery. Under the VDP Scheme, section 6(4) of the Vaccine Damage Payments Act 1979 explicitly allows beneficiaries to claim damages at common law, both generally and in respect of the same injury specifically.

This shared characteristic supports the view that, unlike non-statutory compensation schemes, statutory schemes are created to supplement the tort system. Given this fundamental difference, non-statutory schemes like the vCJD Trust – created to provide victims of BSE/vCJD with an alternative to the tort system, as discussed in the previous section – stand out as anomalies. Unlike other non-statutory schemes, the vCJD Trust explicitly allows beneficiaries or their families to pursue 'legal proceedings against the Crown and/or related bodies if so advised'.[108] This provision suggests that beneficiaries can claim compensation for the same conditions through both the scheme and legal action, a rule seemingly at odds with the scheme's main motivation. However, as the next section will demonstrate, there is more than one way to achieve the same outcome. It will show that the vCJD Trust, despite preserving beneficiaries' right to sue, is also designed to circumvent the tort system.

(b) Subsequent compensation awarded via the tort system

The question of whether – and to what extent – a beneficiary can obtain damages in addition to a compensation scheme payment is closely tied to the possibility of pursuing a subsequent tort action. If a beneficiary is entirely barred from initiating legal proceedings after receiving a scheme payment, the

[104]Hansard HC Deb, above n 42, col 1110.

[105]*Claims Handling Agreement (England and Wales) between the Department of Trade & Industry and the British Coal Respiratory Disease Litigation Claimants Solicitors Group*, above n 64, cl 68.

[106]*Claims Handling Arrangement (England and Wales) between the Department of Trade & Industry and the Vibration White Finger Litigation Solicitors Group*, above n 65, cl 19.

[107]In particular, the recovery of lump sum payments made under these schemes from subsequent damages is governed by s 1A of the Social Security (Recovery of Benefits) Act 1997, along with Arts 4, 4A and Part 3 of The Social Security (Recovery of Benefits) (Lump Sum Payments) Regulations 2008, SI 2008/1596 as amended.

[108]Trust Deed (including First, Second, Third, Fourth and Fifth Deeds of Variation and Amendment and Fifth Schedule) between the Trustees and the Secretary of State for Health, 10 October 2024, p 2 (under B); available at https://ffappfieldef12ed668b.blob.core.windows.net/vcjdtrust/wp-content/uploads/2024/12/Owen-General-vCJD-Trust-Deed-incorporating-5th-Amendment-in-tracked-changes-less-First-Schedule-10.10.24.pdf (last visited 18 June 2025).

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issue of additional compensation does not arise. However, if no such bar exists, there is a genuine possibility of obtaining a civil award alongside the scheme payment.

The issue of subsequent compensation is particularly problematic when beneficiaries of a compensation scheme are permitted to claim damages for medical conditions already covered by the scheme. This is the case for statutory compensation schemes as well as the vCJD Trust, a non-statutory compensation scheme. In such situations, as illustrated in *Ballantine v Newalls Insulation Company Ltd*,[109] both the civil award and the scheme payment compensate the same medical conditions. These two sources of compensation directly overlap, creating a real risk of double compensation. To mitigate this risk, the overlap is managed through systems of recoupment or reduction. Under recoupment, 'the damages … may, or may not, be reduced by the amount of benefit received from the other sources',[110] but 'the providers of … collateral payments are allowed to seek reimbursement from the tortfeasor'.[111] This system applies to the three dust-related statutory compensation schemes (1979, 2008 and 2014 schemes). In contrast, under reduction, 'the damages are reduced by the amount of benefit received, but the collateral source is given no right to seek reimbursement'.[112] The VDP Scheme and the vCJD Trust use this system.

The following section argues that the recoupment system favoured by most statutory compensation schemes aligns fully with their main objective: to supplement rather than supplant the tort system. It also demonstrates that the reduction system applied to the vCJD Trust, a non-statutory compensation scheme, is also coherent with its overarching goal of bypassing the tort system. Finally, the section contends that the reduction system used in the VDP Scheme, a statutory scheme, is fundamentally at odds with its objectives and produces an undesirable outcome from a corrective justice perspective. The section concludes by advocating for reform of the VDP Scheme.

(i) Statutory compensation schemes and the system of recoupment

The system of recoupment, initially created for the recovery of social security benefits from tort damages, was progressively extended to lump sum payments made under the 1979,[113] 2008[114] and 2014[115] dust-related statutory compensation schemes. Under this system, the tortfeasor is liable to reimburse the provider of a scheme payment – which, for the three statutory schemes, is the Secretary of State. Two potential scenarios arise, depending on the level of damages awarded. If the damages awarded to the beneficiaries are equal to or higher than the lump sum payment, the tortfeasor is liable to pay the Secretary of State an amount equal to the total recoverable lump sum. As a result, the claimant's civil award is reduced accordingly.[116] In this first situation, the Secretary of State recoups the full lump sum payment, while the claimant obtains whatever remains, if anything, of the civil award. Alternatively, if the damages awarded are less than the lump sum payment, the tortfeasor is liable to pay the Secretary of State an amount equal to the total damages. In this second situation, the Secretary of State recoups only part of the lump sum payment, and the victim receives nothing further.[117] This recoupment system in England and Wales seemingly appears to offer an appealing outcome: the tortfeasor ultimately 'pays' for the damage, the statutory scheme is (at least partly) reimbursed, and beneficiaries are not compensated twice for the same injury. At worst, they recover nothing; at best, they receive a 'top up', ie the difference between the total damages awarded and the lump sum payment.

[109][2001] ICR 25.
[110]R Lewis *Deducting Benefits from Damages for Personal Injury* (Oxford: Oxford University Press, 1999) p 3.
[111]Ibid, p 3.
[112]Ibid, p 3.
[113]Child Maintenance and Other Payments Act 2008, s 54; The Social Security (Recovery of Benefits) (Lump Sum Payments) Regulations 2008, SI 2008/1596, Art 4.
[114]Ibid, Art 4.
[115]Mesothelioma Act 2014, Sch 1, Pt 1.
[116]The Social Security (Recovery of Benefits) (Lump Sum Payments) Regulations 2008, SI 2008/1596, Art 10.
[117]Ibid, Art 10.

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The difficulty with this recoupment system is that compensation schemes do not have a direct action against the tortfeasor, meaning they rely entirely on beneficiaries to initiate legal proceedings to recover the lump sum payment from a civil award. This was not the only possible solution; other legal systems, such as the French, opted to allow compensation schemes to sue the tortfeasor directly.[118] The English and Welsh legal system, however, chose differently, and there are legitimate reasons for favouring this approach. One such reason is that it allows compensation schemes to focus solely on their 'compensation mission', rather than diverting funds and attention to the often expensive, uncertain and lengthy process of recovering lump sum payments.[119]

Regardless of alternative solutions, the recoupment system implemented for statutory compensation schemes appears to align with the objective of these schemes, at least when beneficiaries are incentivised to take legal action against the tortfeasor. If, as previously suggested, the objective of statutory compensation schemes is to supplement the tort system, then presumably beneficiaries should be encouraged to pursue the tort route, should it become available. This would not only encourage beneficiaries to initiate legal proceedings against the party truly responsible for their damage, but also allow statutory compensation schemes to recover the lump sum payment from the tortfeasor through the recoupment system. The incentive for beneficiaries to take legal action against the tortfeasor depends on two factors: (1) their chances of success; and (2) the level of damages awarded.

Claimants with little chance of success are unlikely to pursue an action in tort. In dust-related cases, such as those covered by the 1979, 2008 and 2014 statutory compensation schemes, the courts have taken a more relaxed approach to tort claims, particularly where issues of causation are concerned.[120] This approach undoubtedly increases claimants' prospects in court. Equally, for beneficiaries to have an incentive to initiate legal proceedings against the tortfeasor, the lump sum payment must be *lower* than the civil award, as this is the only configuration in which beneficiaries can potentially receive a 'top up'. Beneficiaries of the Pneumoconiosis Scheme (1979)[121] and the Mesothelioma Scheme (2008) appear to have such an incentive, as the payment tariffs were intentionally set lower than the damages awarded.[122] The Diffuse Mesothelioma Payment Scheme (2014), however, is quite different. Due to the low number of applicants,[123] the payment tariffs, initially set at 80% of the average damages,[124] was altered to provide 100% of the average civil award. While beneficiaries initially had a clear incentive to pursue the tort route,[125] it is unlikely they still do. In fact, for this specific scheme, the increase in the tariff (to 100%) aligns with the idea that the scheme has become the only remaining route for redress.

Beneficiaries of the 2014 scheme have no difficulty proving their employer's liability, as eligibility for the scheme requires demonstrating the employer's negligence or breach of statutory duty.[126] Additionally, in mesothelioma cases, judges adopt a flexible approach to causation, using the claimant-friendly *Fairchild* test rather than the traditional 'but for' test.[127] When employees cannot establish, through the 'but for' test, that their mesothelioma resulted from tortious exposure to asbestos by a specific employer, they can still meet the causation requirement by demonstrating that the exposure materially increased

[118]In the French legal system, for example, the subrogation mechanism is commonly used. Under this system, once the scheme compensates the victims for their damage, the right to bring legal proceedings against the tortfeasor is transferred from the victims to the scheme. However, the scheme can only recover the *exact amount* it paid to the beneficiaries from the tortfeasor. For further details, see Lemaire, above n 6, pp 169–170; Knetsch, above n 5, pp 380–384.

[119]For additional reasons justifying the preference for the recoupment system, see Lemaire, above n 6, pp 170–171.

[120]See the text to nn 127–128.

[121]Hansard HC Deb, vol 976, cols 207–208, 17 December 1979.

[122]Hansard HL Deb, vol 697, col 585, 18 December 2007.

[123]Department for Work & Pensions *Diffuse Mesothelioma Payment Scheme*, Annual Review 2014/2015 (2015) pp 15–16, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/480152/diffuse-mesothelioma-payment-scheme-review-2014-2015.pdf (last visited 18 June 2025).

[124]Although state-run, the 2014 scheme is privately funded through a levy on insurers operating in the employers' liability market. The initial tariff table of payments was, therefore, a compromise with the insurance industry.

[125]Hansard HL Deb, vol 745, col 693, 20 May 2013. Also see Department for Work & Pensions, above n 73, p 8, para 4.2.

[126]Mesothelioma Act 2014, s 2(1)(a).

[127]*Fairchild v Glenhaven Funerals Services Ltd* [2002] UKHL 22.

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their *risk* of contracting the disease. This exceptional causation rule is particularly advantageous for claimants with asbestos-related mesothelioma, as it leads to liability for the entire damage (one tortious employer) or joint and several liability (multiple tortious employers) under section 3 of the Compensation Act 2006.[128] Thus, beneficiaries of this scheme have strong prospects in court.[129] However, they often cannot secure a civil award because, due to the long latency of mesothelioma, by the time the disease manifests, the employer has usually disappeared, and the employer's insurer cannot be traced. As explained before, the scheme was set up because there was no one left to sue.[130] Had there been anyone left to hold accountable, it is highly likely that a tort action would have been successful.

(ii) Non-statutory compensation schemes and the system of reduction

Beneficiaries of the vCJD Trust, a non-statutory compensation scheme, can claim a civil award for the same injury that resulted in the scheme payment, potentially leading to an overlap in sources of compensation. Unlike the three dust-related statutory schemes mentioned above,[131] the vCJD Trust does not have a specific provision for recoupment of payments. Accordingly, any overlap is likely to be handled through a system of reduction.[132]

In broad terms, the system of reduction operates similarly to recoupment, with one noticeable difference: the collateral source (ie the provider of the scheme payment) does not recoup the payment. Unlike recoupment, the reduction system appears quite favourable to defendants because they 'pay less money to the claimants',[133] and 'have no duty to refund the payments from the collateral sources'.[134] As such, compensation to beneficiaries is partly borne by the compensation scheme (and taxpayers) rather than the tortfeasors. Yet, there are valid reasons for privileging reduction over recoupment, especially in situations involving non-statutory compensation schemes. Since these schemes are designed to bypass the tort system and are set up and funded by defendants, the defendant and the provider of the scheme payment are the same. As illustrated by the vCJD Trust, the Government acts as both the defendant and the scheme's funder. Implementing a recoupment system for these *ex gratia* payments would be a wasteful process, given the time and administrative costs involved. For non-statutory compensation schemes, the reduction system is the more efficient option.

Claimants face the same dilemma under the system of reduction as they do under recoupment: whether to bring a civil claim following the receipt of a scheme payment. Likewise, the decision depends on the existence of an incentive to initiate legal proceedings, which is determined by: (1) the chance of success; and (2) the amount of damages awarded. In respect of the vCJD Trust, eligible beneficiaries have no incentive whatsoever to bring a civil claim. Not only is the compensation level under the scheme 'at (or near) 100% of what might be awarded at common law',[135] but in addition some beneficiaries may actually be in a better position under the scheme than they would be under the common law. For example, qualifying carers claiming compensation for their psychiatric injury may succeed under the scheme,[136] where they would fail in court.[137] Accordingly, even though eligible recipients under the vCJD Trust could initiate legal proceedings against the tortfeasor, they have little reason to do so. These

[128]As illustrated in *Heneghan v Manchester Dry Docks* [2016] EWCA Civ 86, proportional liability applies (as established in *Barker v Corus UK Ltd* [2006] 2 AC 572) for claimants who have contracted a different disease.

[129]N Wikeley 'The diffuse mesothelioma payment scheme 2014' (2014) 21(2) Journal of Social Security Law 65 at 68–69.

[130]Department for Work & Pensions, above n 123, p 8.

[131]For the 1979 and 2008 schemes, recoupment was introduced by the Child Maintenance and Other Payments Act 2008, s 54. For the 2014 scheme, it was introduced by the Mesothelioma Act 2014, Sch 1.

[132]Trust Deed, above n 108, p 2 (under B); see *R (on the application of Mc Vey) v Secretary of State for Health* [2009] EWHC 3084 (Admin), at [2] (Black J).

[133]Lewis, above n 110, p 3.

[134]Ibid.

[135]Boggio, above n 47, at 163; Williams, above n 47, at 42–43; S Macleod 'Creutzfeldt-Jakob Disease' in Macleod and Hodges (eds), above n 2, p 578.

[136]Trust Deed, above n 108, cl 4.3.

[137]Macleod, above n 135, p 578. These claimants would be classified as 'secondary victims'.

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findings are also borne out in practice, with only one reported case involving beneficiaries of the vCJD Trust. Even that case demonstrates a clear lack of interest in bringing tort claims, as the beneficiaries sought a revision of the scheme rules rather than damages.[138] This lack of incentive is intentional, as confirmed in the briefing note to the Secretary of State:

> There is no requirement under the Scheme to compromise a civil claim but any person who receives sums has to give credit for those in any subsequent litigation brought against the Department. It is in the Department's interest that any sums paid out approximate to any sums which might be recovered in civil litigation as far as possible in order to reduce the incentive to bring litigation.[139]

The conclusion, therefore, is that, like many other non-statutory compensation schemes,[140] the vCJD Trust was established to divert compensation claims away from the courts – likely to avoid the costs of litigation and minimise public attention on the 'BSE scandal'.

(iii) The VDP Scheme and the system of reduction: time for a reform

The VDP Scheme is a statutory compensation scheme. Beneficiaries who successfully apply and receive the £120,000[141] lump-sum payment may also claim damages at common law for the same vaccine injury, potentially leading to an overlap between the sources of compensation. This has not occurred so far and is unlikely to in the future, as recipients of the VDP Scheme have no incentive to bring a civil claim, even though a civil award is likely to exceed[142] the £120,000 statutory payment. Claiming under the scheme is challenging and rarely successful.[143] Yet, obtaining compensation through the tort route is even more difficult, making the chances of success extremely low.[144]

Nevertheless, it is impossible to say that a vaccine-injured claimant will never succeed at common law. In cases of overlap between the statutory payment and the civil award, 'the court shall treat a payment [under the VDP Scheme] as paid on account of any damages which the court awards in respect of such disablement'.[145] Considering that there is no provision for recouping the statutory payment, the only option remaining is the system of reduction. This is highly problematic where statutory compensation schemes are concerned. Unlike non-statutory compensation schemes, statutory compensation schemes are not designed to circumvent the tort system and, as such, are not created by defendants to tort law actions.[146] For this reason, the provider of a payment under these schemes is *not* the defendant in liability claims. In the case of the VDP Scheme, for instance, the provider of the payment is the Secretary of State,[147] while the defendant in tort law actions is often the vaccine producer[148] or the doctor who administered it. Claimants who are vaccine-injured rarely initiate legal actions against public authorities that recommended the vaccine in the interest of the community. In these circumstances, favouring the system of reduction over recoupment leads to an unsatisfactory outcome in terms of corrective justice:

[138] *R (on the application of McVey & Others) v Secretary of State for Health* [2009] EWHC 3084 (Admin).

[139] Mulcahy, above n 54, para 17.

[140] Such as the Macfarlane (Special Payments) (No 2) Trust, the VWF and COPD Schemes, and the Pneumoconiosis Scheme (1974).

[141] The Vaccine Damage Payments Act 1979 Statutory Sum Order 2007, SI 2007/1931.

[142] Fairgrieve et al, above n 9, p 6; Tindley, above n 90, at 360.

[143] See the figures presented in Rajneri et al, above n 95, at 90.

[144] See the text to nn 87–102.

[145] Vaccine Damage Payments Act 1979, s 6(4).

[146] The Infected Blood Compensation Scheme (2024) is an exception in this regard.

[147] Vaccine Damage Payments Act 1979, s 1(1).

[148] With the exception of victims of the Covid-19 vaccine, see Lemaire, above n 98. In this case, the Government has agreed to indemnify the producers of the Covid-19 vaccines. As a result, if a producer is held liable, the Government will be the actual debtor. Therefore, if the victims of the Covid-19 vaccine receive both a payment under the VDP Scheme and tort damages through legal action, both payments effectively come from the Government. In this specific case, the implementation of a reduction system is not particularly problematic. However, the Government's decision to indemnify the producers of the Covid-19 vaccines is an exceptional measure, justified by the urgent need to launch the vaccination campaign amid a global pandemic.

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defendants pay less money to claimants without having to reimburse the compensation scheme. Considering that statutory schemes like the VDP Scheme are often[149] publicly funded, this effectively means that taxpayers are (at least partly) footing the bill, even when the defendant is held liable for the damage. This is a clear flaw in the design of the VDP Scheme that should be addressed in the future. More specifically, recoupment should be implemented for the VDP Scheme, in line with other statutory schemes.

5. Conclusion: what can we learn?

Recent calls for new compensation schemes in public health reflect a growing interest in using these mechanisms to provide compensation to specific victim groups. Yet, the development of such schemes has remained under-analysed in England and Wales, despite their long-standing existence in the legal system. This paper challenges the perception that these schemes have developed chaotically and with little discernible logic behind them, arguing instead that in the field of occupational and public health, they often follow an identifiable, albeit covert, pattern defined by their relationship with the tort system. Specifically, two distinct logics behind the creation and operation of these schemes were identified, forming the basis of a categorisation that proves valuable for several reasons.

First, it differentiates between Government-led compensation schemes rooted in social solidarity and those that are not, thus challenging common assumptions about the rationale behind such schemes. Despite the Government's frequent claims to the contrary, non-statutory compensation schemes cannot be justified on the grounds of social solidarity because they are primarily motivated by a desire to avoid litigation. In contrast, only statutory compensation schemes can credibly claim a connection to social solidarity, as they are specifically designed to complement the tort system in situations where it is unavailable to some extent.

Secondly, the categorisation cements our understanding of the place and limits of the tort system in England and Wales. As surprising as it may seem, the growing importance of compensation schemes highlights the central place that the tort system continues to occupy in this legal system. Whether these schemes are created to divert liability claims away from the tort system or to address its unavailability, they are, in any case, established *in reaction to the tort system.* The centrality of the tort system may be more obvious in the case of non-statutory compensation schemes, which are designed to supplant it. However, it is in relation to statutory compensation schemes that the true importance of the tort system is most clearly revealed. The way these schemes operate – such as the existence of eligibility rules designed to root out applicants with a potential tort claim, and the fact that beneficiaries always retain the right to bring legal claims – demonstrates that the tort system remains the primary route for redress, with statutory compensation schemes serving as a subsidiary option.

Thirdly, the categorisation can facilitate the detection of possible outliers and highlight areas for reform. For example, while the vCJD Trust initially *appears to deviate* from the identified pattern, it ultimately mirrors the outcome of other non-statutory schemes by discouraging beneficiaries from pursuing tort claims through different means. As such, this scheme can be classified as a 'false outlier'. Conversely, other compensation schemes, such as the VDP Scheme, only *appear to conform* to the identified pattern. While this scheme seems to share characteristics with other statutory compensation schemes, it deviates in one notable respect: it uses a system of reduction instead of recoupment, allowing tortfeasors to pay less compensation without reimbursing the scheme. This shifts part of the burden to the taxpayers, which this paper argues is unjustifiable. As such, the VDP Scheme can be classified as a 'true outlier' which suggests the need for reform to introduce recoupment and align it with other statutory schemes.

Finally, the categorisation could help uncover unarticulated guiding rules for compensation schemes in England and Wales. Based on the foregoing analysis, what can be observed is this: whether statutory or

[149]With the exception of the Diffuse Mesothelioma Payment Scheme (2014) which is funded through a levy imposed on the current employers' liability insurance market.

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non-statutory, the compensation schemes presently studied all implement a system that prevents beneficiaries from double recovery, ie the possibility to cumulate both the scheme payment and the civil award for the same injury or heads of damage. The mechanisms adopted to achieve this outcome are diverse, ranging from rules that exclude alternative claims in tort law for the same injury to rules that allow for the deduction of the scheme payment from civil awards (whether through recoupment or reduction). Could this suggest the applicability, in principle, of the rule against double recovery in the context of compensation schemes, particularly in terms of how they interact with tort damages? Only further research could confirm whether this can truly be regarded as a guiding rule for the development of compensation schemes.

These insights into the development of compensation schemes in England and Wales are an important step toward a clearer understanding of their underlying principles and their evolving relationship with the tort system. However, the work presented here is merely a foundation. To fully comprehend the complexities of these schemes and their role within the broader compensation landscape, further research is needed. Future investigations must delve deeper into the intricate interplay between compensation schemes and other sources of compensation, such as social security. Only through such comprehensive analysis can we ensure that these important mechanisms function effectively within the broader compensation landscape.

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